UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VERA C. JOHNSON, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DE04328910042 DATE: APR 03 1990

Frank E. Kohl, Esquire, Leavenworth, Kansas, for the appellant.

Paul Curran, Esquire, Fort Leavenworth, Kansas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The agency has petitioned for review of the initial decision dated February 23, 1989, that reversed the agency's action removing the appellant for unacceptable performance. For the reasons set forth below, we GRANT the petition for review under 5 U.S.C. § 7701(e), REVERSE the initial decision, and SUSTAIN the agency's action.

BACKGROUND

The appellant was removed pursuant to 5 U.S.C. § 4303 from her position as a Military Personnel Clerk based on her

unacceptable performance of critical element one of her position. That element required the appellant to maintain individual military personnel jacket and personnel qualification records. On appeal to the Board, the appellant argued that the agency had not provided her correct job standards for her position, that no performance appraisal was issued during the 15 months she was employed in the clerk position, that she had received no training, and that she had been discriminated against because she was a black female. The appellant waived her right to a hearing.

In an initial decision dated February 23 19[illegible] based on the written record, the administrative judge reversed the agency's action. He found that, although the record established that the Office of Personnel Management had approved the agency's performance appraisal system as required under 5 U.S.C. Chapter 43, the performance standard for the critical element in question was unreasonable, absolute, and unattainable, and constituted an abuse of discretion by the agency. Because he found the performance standard invalid, the administrative judge did not address the appellant's allegations that she did not receive proper training during the performance improvement period (PIP) and that she was denied a timely performance appraisal. The administrative judge, however, did adjudicate the appellant's allegations of racial and sexual discrimination, finding that she failed to establish that the agency had discriminated against her in effecting the action.

In its petition for review, the agency argues that the appellant's performance standard was valid, that the record establishes that the appellant made no effort to meet that standard, and that, in any case, the administrative judge committed reversible error in basing his decision on the issue of the validity of the performance standard because this issue was not previously raised.[1] The appellant has responded in opposition, noting that she does not wish to reopen her claims of discrimination even though she did not prevail upon them below, but requesting relief including attorney's fees.

ANALYSIS

The administrative judge erred in his analysis of the agency's performance standard.

To show that a performance standard is valid, an agency must demonstrate that the standard is reasonable, realistic, and attainable. *See, e.g., Walker v. Department of the Treasury*, 28 M.S.P.R. 227 229 (1985) (the requirement of near perfection is unreasonable and allows the agency to remove an employee on the basis of an extremely low error rate).

The performance standard for acceptable performance of critical element one of the appellant's position requires her to:

---

[1] In fact, the appellant had raised the issue that her performance standard was improper. *See* IAF, Tabs 1, 10, 12, 14. The agency's contention that the administrative judge committed reversible error in addressing the issue of the validity of the performance standard is therefore incorrect.

> Ensure all records are maintained in accordance with appropriate regulations and directives and are in "inspection" readiness condition. All corrective action/update must be initiated within 10 days after notification. Inspection results must not reveal reoccurring deficiencies from past years. *See* IAF, Tab 3, Sub-tab F.

The administrative judge interpreted this standard to mean that if one record were not maintained, and if one update were not timely initiated, then the employee would have failed to meet the standard. Thus, the administrative judge considered the standard to be absolute under *Callaway v. Department of the Army*, 23 M.S.P.R. 592, 599 (1984), wherein the Board held that, if one incident of poor performance will result in an unsatisfactory rating of the job element, the standard is considered to be absolute and may constitute an abuse of the agency's discretion. We find, however, that in this case, the administrative judge erred in finding that the standard in question was absolute.

We note that the first sentence of the standard refers to regulations and directives, and that the second and third sentences refer to corrections and deficiencies. We find that the plain meaning of this acceptable performance standard does not preclude the possibility of error by an employee. Instead, it sets a time limit of ten days for the employee to start corrections, and it anticipates that she will cure deficiencies from past years so that they will not reoccur. Accordingly, we find that the performance standard, while arguably less than precise, is not absolute, unreasonable, or unattainable.

Moreover, the Board has found that an agency may give content to a performance standard which is not as precise as it could be by use of oral and written instructions, as well as by other methods of informing the employee of the agency's expectations. *See, e.g., Ruiz v. Department of the Army*, 27 M.S.P.R. 547, 551 (1985); *Baker v. Defense Logistics Agency*, 25 M.S.P.R. 614, 617 (1985), *aff'd*, 782 F.2d 1579 (Fed. Cir. 1986). The record shows that the agency first explained the job standards to the appellant on August 4, 1987, and that she signed them on August 12, 1987.[2] Further, the agency informed her of instances of unacceptable performance and of the need to improve during her tenure, first counseling her on the agency's expectations, and then formally notifying her via memoranda prior to affording her an opportunity to improve. *See* Initial Appeal File (IAF), Tab 1, Memoranda dated 1 April 1988, and 12 May 1988; Tab 3, Sub-tabs F and G; Tab 6, Sub-tab 36; Tab 8. We find, therefore, that the agency communicated its expectations to the appellant and gave content to the standard so that the appellant was on notice as to her obligations, and that, even if the performance standard is not as precise as it might be, it nevertheless meets the statutory

---

[2] The appellant's claim that her standards did not apply to what she did is simply without merit. We note that the standards, in fact, do apply to the position description of her job, Military Personnel Clerk (Typing), GS-4, which encompasses processing of both officer, including student officer, and enlisted military personnel records. *See* IAF, Tab 3, Sub-tabs D and F. The appellant described her position as an enlisted records section clerk, apparently believing that working with enlisted records involved a transfer and different job description from her previous "position" as a "student officer records clerk." *See* IAF, Tab 1.

standard set forth at 5 U.S.C. § 4302(b)(1).[3] *See DePauw v. United States International Trade Commission*, 782 F.2d 1564, 1566 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 815 (1986).

Further, we find that the agency has supported by substantial evidence that, consistent with 5 U.S.C. § 4302(b)(6), the appellant was afforded an opportunity to improve, *see Sandland v. General Services Administration*, 23 M.S.P.R. 583, 587 (1984), and that, notwithstanding, her performance of the cited critical element was unacceptable. Specifically, on May 12, 1988, the agency formally notified the appellant that her performance was unacceptable in processing and maintaining records and that she would be given an opportunity to improve in the form of individualized training and close supervision.[4] *See* IAF, Tab 3, Sub-tab G; Tab 6; Tab 8, Exhibit 17-2. The training, six weekly, two-hour, sessions with her supervisor or an individual appointed

---

[3] The statute mandates the establishment of "performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria. . . ."

[4] The appellant argued that the agency's formal notification of her unacceptable performance was untimely (and otherwise improper) because she had not received notification of her standards and her supervisor had not signed them. *See* IAF, Tab 1. The record shows, however, that the appellant signed her standards on August 12, 1987 and that they had been signed by her then-supervisor on August 6, 1987. Therefore, the appraisal which, in May 1988, rated her performance unacceptable under those standards was proper. In any event, the timing of the appraisal is not relevant to this action since, under 5 C.F.R. § 432.203, an employee whose performance in one or more critical elements becomes unacceptable may be removed at any time during the performance appraisal cycle following notice and an opportunity to improve. *See* IAF, Tab 3, Sub-tabs G and H.

by him, was to cover areas in which the appellant was having difficulty or in which she desired to receive training. Thus, we find that the appellant's contentions that she received inadequate training are not justified in light of the record evidence.[5] *See* IAF, Tab 8. Furthermore, the appellant does not dispute the agency's claim that she had previously held positions requiring the same skills and thus would not need training in those skills. *See* IAF, Tab 3, Sub-tab I.

In addition, we find that the record evidence supports the agency's claim that the appellant's performance, indeed, was unacceptable and that she did not meet the standard. The record shows that the agency identified errors and the appellant's failure to accomplish specific assigned tasks. *See* IAF, Tab 8, Exhibit 17-1; Tab 11. In fact, the appellant does not dispute that there were errors in her work, *see* Petition for Review File, Tab 3, but she speculates that someone else had access to her files and was responsible for those errors. We find such unsupported suppositions without merit.

In light of our findings that the performance standard was valid, that the agency complied with the statutory requirements of notice and opportunity to improve, and that the agency has shown by substantial evidence that the appellant's performance was unacceptable, we sustain the

---

[5] In any event, the agency does not have a generalized obligation to provide formal training during a PIP. *See Macijauskas v. Department of the Army*, 34 M.S.P.R. 564, 569 (1987), *aff'd*, 847 F.2d 841 (Fed. Cir. 1988) (Table).

agency's action of removal. *See Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1566-67 (Fed. Cir. 1985) (the Board has no authority to mitigate a removal or demotion action taken under 5 U.S.C. Chapter 43 for unacceptable performance), *cert. denied*, 475 U.S. 1108 (1986).

Finally, we find that the appellant's request for attorney fees is unwarranted inasmuch as she is not the prevailing party. 5 U.S.C. § 7701(g)(1).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
1801 L Street, N.W., Suite 5000
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.